



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

PROPOSED DECISION

Nurturing R Kidz 2Gether, LLC

ML-10-0133 and ML-10-0134

Pursuant to a petition filed on March 11, 2010, under Wis. Admin. Code § DCF 201.01(1)(c), to review decisions by the Department of Children and Families (the "Department") to refuse to make Wisconsin Shares payments to a child care provider and to seek recovery of overpayments from the Petitioner in the amount of \$5,387.33, a hearing was held on June 9, 2010, at Waukesha, Wisconsin.

The issues for determination are: (1) whether the Department correctly refused to make Wisconsin Shares payments to Petitioner Nikki Russell's day care center based upon reasonable suspicion of program violations, and (2) whether the Department correctly sought recovery of overpayments from Petitioner Nikki Russell in the amount of \$5,387.33 for the period from October 11, 2009 to October 24, 2009.

PARTIES IN INTEREST:

Petitioner:

Nurturing R Kidz 2Gether, LLC, by

Attorney Felicia Miller-Watson
Miller-Watson Law Office, LLC
6045 N. Green Bay Ave., Suite 3A
Glendale, WI 53209

Respondent:

Department of Children and Families, by

Attorney Jennifer Wakerhauser
Department of Children and Families
Office of Legal Counsel
201 East Washington Avenue, 2nd Floor
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

Sally Pederson
Division of Hearings and Appeals

FINDINGS OF FACT

1. On December 17, 2007, the Department issued a Child Care Center License to Petitioner to operate a family child care center known as Nurturing R Kidz 2Gether, LLC (the "Center") located at 5576 N. 76th Street, Milwaukee, WI 53218. The license authorized the care of up to 50 children at one time between the hours of 5:00 a.m. and 3:00 a.m., Sunday through Saturday. (Exhibit R-2)
2. When applying for a child care center license, child care providers receive copies of the administrative rules which describe the requirements related to maintaining accurate, written attendance records. The Petitioner signed the license application, acknowledging that she had received the administrative rules that govern group child care centers. (Ex. R-1)
3. The Department prepared newsletters that it sent to child care providers, including the Petitioner, who participated in the Wisconsin Shares program, informing the providers that they are required to keep accurate and exact attendance records, including the actual arrival and departure times for each child. (Ex. R-13)
4. The Petitioner attested to the accuracy of the Center's attendance records on Child Care Attendance Reports that she signed and submitted. (Ex. R-9)
5. During a visit made by a Licensing Specialist to the Center on June 19, 2008, Petitioner was cited for numerous and varied violations of the administrative rules governing the Wisconsin Shares program, including noncompliance with daily attendance record requirements. The Petitioner took corrective actions to remedy the violations. (Ex. R-3, Testimony of Nikki Russell, owner of the Center)
6. On September 25, 2009, an anonymous caller left a message on the Department's fraud hot line regarding the Center. As a result of that anonymous call, the Department began an investigation into whether the Center was violating Wisconsin Shares program requirements. (Ex. R-4, Testimony of Robert Hietala, senior auditor in the Department's Fraud Detection and Investigation Unit of the Division of Early Care Regulation)
7. On October 21, 2009, licensing specialist Paul Sprink conducted a site visit to the Center but was unable to gain access into the Center. He rang the door bell and knocked on two front doors of the Center, but there was no response. Mr. Sprink did not see any children and observed that it was dark in the Center. He saw two vans in the parking lot and spoke to an elderly neighbor who said she had not seen any children there that day. Mr. Spring was at the Center approximately 10 to 15 minutes. (Ex. R-5, Testimony of Paul Sprink, licensing specialist with the Department)
8. The Petitioner testified that she was at the Center on October 21, 2009 and that there were also six or seven other employees at the Center that day. (Testimony of Nikki Russell)
9. On October 28, 2009, two licensing specialists from the Department visited the Center to collect attendance records. (Ex. R-6) One of the licensing specialists, Jennifer Sabree, discussed with the Petitioner that the sign-in and sign-out sheets at the front door and in the classrooms did not completely match, and the Petitioner said it was because some

children were transported by Center staff but were not physically present at the Center. The licensing specialists did not obtain the transportation attendance records because those records were in the Center's van, which was not at the Center during the visit. The licensing specialists collected two sets of attendance records from the Center's classrooms and front door area. (Ex. R-10 and P-2, Testimony of Jennifer Sabree, licensing specialist with the Department)

10. The Petitioner testified that another licensing specialist from the Department had previously told her to keep the transportation attendance records in the Center's van and that the Petitioner offered to get the transportation records for the licensors on October 28, 2009. (Testimony of Nikki Russell)
11. The Department conducted an audit of the attendance records that were collected on October 28, 2009 and discovered that the Center had reported children in attendance on October 21, 2009, even though the licensing specialist was unable to gain access to the Center on that date. (Ex. R-7) In addition, the auditor uncovered discrepancies between the attendance records and the billing records and determined that, based upon the discrepancies and inconsistencies between the records, the Center had been overpaid \$5,387.33 in child care payments for the period from October 11, 2009 to October 24, 2009. (Ex. R-9, R-10, and R-11, Testimony of Emily Woger, auditor for the Department's Division of Early Care Regulation)
12. The auditor who conducted the audit of the Center's records is no longer employed by the Department. The Department's normal procedure is to choose one set of attendance records to audit when more than one set of attendance records is provided by a day care provider. Auditor Emily Woger testified that an auditor typically chooses the most legible set of attendance records to audit and that a Department auditor will not review and compare more than one set of attendance records to the billing records. (Testimony of Emily Woger)
13. On February 26, 2010, the Department issued a letter to the Petitioner stating that, effective February 27, 2010, it was suspending all Wisconsin Shares payments to the Center based on a reasonable suspicion that the Center had violated provisions of the Wisconsin Shares program, specifically that the Center had failed to provide access to the day care facility during stated hours of operation and failed to maintain and submit accurate attendance records. The letter cited violations of Wis. Adm. Code DCF 201.04(6)(e), DCF 250.04(6)(a), and DCF 250.04(6)(b). The authorizing statute for the action was Wis. Stat. § 49.155(7)(b)4, which became effective February 1, 2010, although the letter incorrectly cited the pre-amended statutory section, which was Wis. Stat. § 49.155(7)(a)4. (Ex. R-7)
14. Also on February 26, 2010, the Department issued a letter to the Petitioner stating that it had determined that the Petitioner was in violation of the Wisconsin Shares program regulations for receiving payments for child care that had not been provided as reported and that it would proceed with recovery in the amount of \$5,387.33 for the period from October 11, 2009 to October 24, 2009. (Ex. R-8)

15. On March 11, 2010, the Petitioner appealed the Department's suspension decision and intent to recover overpayment.

DISCUSSION

Wisconsin Stat. § 49.155(7)(b) provides that the Department may refuse to pay a child care provider for child care provided under the Wisconsin Shares program if the "department or county department reasonably suspects that the person has violated any provision under the program under this section or any rule promulgated under this section."

Wisconsin Admin. Code § DCF 250.04(2)(c) requires licensees to "[e]nsure that all information provided to the department is current and accurate." Section DCF 250.04(6)(b) provides that the licensee "shall maintain a current, accurate written record of the daily attendance on a form prescribed by the department that includes the actual time of arrival and departure for each child for the length of time the child is enrolled in the program." *See also* Wis. Stat. § 49.155(6m)(a).

If a child care provider submits false, misleading, or irregular information to DCF, or if the child care provider fails to comply with the terms of the Wisconsin Shares child care subsidy program and fails to provide to the satisfaction of DCF an explanation for the noncompliance, DCF may recoup payments made to the child care provider. Wis. Stat. § 49.155(7m)(a). A child care administrative agency shall take all reasonable steps necessary to recoup or recover from a provider any overpayments made for child care services for which the provider was responsible, or overpayments caused by administrative error that benefited the provider. Wis. Admin. Code § DCF 201.04(5)(b).

Petitioner should have been well aware of the requirements to keep accurate daily attendance records for the Center. She received notice of these requirements from the Department at the time of license application, during visits from licensing specialists, and in newsletters sent out with program payments. (Ex. R-3, Testimony of Jennifer Sabree) The newsletters reiterated the need to keep accurate, up-to-date attendance records and the requirement that providers are required to make records available to licensing agents upon request. (Ex. R-13) In addition, Petitioner certified that her attendance reporting was accurate on the Child Care Attendance Reports that she signed and submitted. (Ex. R-9)

In this case, the Department initiated an investigation of the Center after receiving an anonymous call about the Center on their fraud hot line. However, the anonymous call was not the basis for the "reasonable suspicion" determination. As part of the investigation, a licensing specialist was sent to the Center to conduct an on-site visit on October 21, 2009, but he was unable to gain access to the Center. The Petitioner did not offer any convincing evidence as to why no one would have answered the door for the licensing specialist if, in fact, there were at least six employees present on that date.

On October 28, 2009, licensing specialists visited the Center and obtained attendance records from the Center. An audit was conducted and a comparison of the daily attendance sheets with the Center's billing reports revealed serious discrepancies. The Petitioner's testimony at the hearing regarding the discrepancies focused on her belief that the auditor relied

on attendance records that were not the primary attendance records and that the second set of attendance records, marked as Ex. P-2, would have matched the billing records. However, discrepancies between the attendance records marked Ex. P-2 and Ex. R-10 should not have existed, and the Department's auditors were not legally obligated to audit and compare two sets of presumably duplicate attendance records to the billing records. Auditor Emily Woger credibly gave examples of the discrepancies between the attendance and billing records at the hearing.

The Center's failure to provide access to the day care facility during stated hours of operation and failure to maintain and submit accurate attendance records provided the Department with a reasonable suspicion that Petitioner had violated program rules. The evidence on the record shows that the Department reasonably exercised its discretion in deciding that the violations warranted a payment refusal under Wis. Stat. 49.155(7)(a)4.

In addition, the credible evidence on the record shows that overpayments were made to Petitioner and that it correctly determined that the overpayment was in the amount of \$5,387.33 for the period from October 11, 2009 to October 24, 2009. There is no basis for reversing or changing the Department's decision to refuse to make Wisconsin Shares payments to the Center based on reasonable suspicion of program rule violations and its decision to seek recovery of overpayments from the Petitioner in the amount of \$5,387.33.

CONCLUSIONS OF LAW

1. The Department had a reasonable suspicion that Petitioner was violating child care rules and reasonably exercised its discretion in refusing to make Wisconsin Shares payments pursuant to its authority under Wis. Stat. § 49.155(7)(b)4.
2. The Department correctly determined that the Petitioner was overpaid in the amount of \$5,387.33 for the period from October 11, 2009 to October 24, 2009 and correctly exercised its authority to recoup those overpayments under Wis. Stat. § 49.155(7m)(a).

NOW, THEREFORE, it is

ORDERED

That the petition for review is hereby dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Children and Families for final decision-making. The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of
Madison, Wisconsin, this _____
day of _____, 2010.

Sally Pederson
Administrative Law Judge
Division of Hearings and Appeals